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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MCA RECORDS, INC., Plaintiff, Cross-defendant and Appellant, v. J. I. ALLISON et al., Defendants, Cross-complainants and Appellants.	B199801 (Los Angeles County Super. Ct. No. BC208485)

APPEALS from a judgment of the Superior Court of Los Angeles County. George H. Wu, James R. Dunn, Judges. Affirmed in part, modified and remanded in part.

Law Office of James Zwickel, James E. Zwickel; Law Office of Caryn Sanders, Caryn Sanders for Defendants, Cross-complainants and Appellants J. I. Allison and Joe B. Mauldin.

Tessler & Ruttenberg, Brian M. Grossman; Coggan & Tarlow, Jay M. Coggan for Defendants, Cross-complainants and Appellants Larry Holley, Travis Holley, Pat Holley Kaiter and Maria Elena Holly.

Munger, Tolles & Olson, Glenn D. Pomerantz, Tamerlin J. Godley for Plaintiff, Cross-defendant and Appellant.

This litigation involves a dispute over the proper amount of royalties to be paid by MCA Records, Inc. (MCA) for songs by rock and roll legends Buddy Holly and the Crickets (J. I. Allison and Joe B. Mauldin).

Following a court trial, Buddy Holly's heirs (Holly's wife and others)[1] and the estate of Norman Petty (the former manager of Holly and the Crickets),[2] recovered a total of approximately $251,000 in additional royalties and prejudgment interest. The Crickets recovered approximately $234,000 in additional royalties and prejudgment interest.

The Holly heirs, the Petty estate, and the Crickets contend the trial court erred when it: (1) tried an equitable accounting claim first and thus denied them a jury trial; (2) granted summary adjudication against them on contract claims that were not barred by the contractual or statutory limitations periods because of the delayed discovery rule; (3) dismissed the Crickets' claim for breach of fiduciary duty; (4) denied the Holly heirs' motion for leave to file a second amended complaint to add a fraud claim based on summary royalty statements that were misleading by their concealment of unauthorized deductions; (5) ruled that MCA was permitted to apply a packaging deduction and a so-called foreign uplift in calculating royalties; and (6) abused its discretion in determining the amount of prejudgment interest. MCA cross-appeals and contends that all the royalty claims are completely barred because the original contract dates in the 1950's and 1960's, rather than the periodic royalty payment dates, should have been used in determining the expiration of the contractual and statutory limitation periods (two and four years respectively).

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1 Maria Elena Holley is Buddy Holly's widow. The other Holly heirs are Larry Holley, Travis Holley, and Pat Holley Kaiter, who are Buddy Holly's siblings; they inherited their royalty interests from their parents Larry Holley and Ella Holley.

The correct spelling of Buddy Holly's surname is "Holley." However, when he signed his first recording contract, his name was misspelled in the contract. He apparently adopted the misspelling as his professional name.

2 Lyle Walker is the co-executor of the estate of Norman Petty. Walker and the Holly heirs have jointly filed their briefing in the present appeal.

We modify the judgment to increase the amount of royalties awarded by eliminating the void packaging deduction, and remand the matter to the trial court for calculation of that adjustment. All other contentions are unavailing.

FACTUAL AND PROCEDURAL SUMMARY

The recording contracts.

In January of 1956, Buddy Holly entered into a recording contract with Decca Records, Inc. (Decca), a predecessor of MCA. Pursuant to that agreement, all sound recordings created by Holly during the term of that agreement became the property of Decca, subject to payment of royalties for the use of those sound recordings as provided in the agreement. In May of 1957, Holly entered into a second recording contract with the same relevant royalty terms with Coral Records, Inc. (Coral), an affiliate of Decca and another predecessor of MCA.

In March of 1957, the Crickets signed a similar recording contract with Coral. Just like the contracts with Holly, all sound recordings created by the Crickets during the term of the agreement became the property of Coral, subject to payment of royalties on the use of those recordings as provided in the agreement. Holly and the Crickets also entered into a series of master purchase agreements, by which they sold certain master recordings to Coral under similar royalty terms.

In the summer of 1958, Holly went to New York, met his future wife Maria, and married her in August of 1958. Six months later, on February 3, 1959, Holly and other musicians (Ritchie Valens and J. P. “The Big Bopper” Richardson) were killed in a plane crash.

After Holly’s death, Norman Petty (Holly’s former manager) and Holly’s wife and parents contacted Coral regarding as yet unreleased Holly sound recordings that they asserted were not subject to any of the existing recording contracts with Coral or Decca. In June of 1962, Holly’s wife and parents and Petty entered into a master purchase agreement with Coral to sell those recordings on similar royalty terms as the previous contracts, but at a higher royalty rate. The 1962 agreement did not include the Crickets, although their recorded performances were also contained on the master recordings that were the subject of the agreement.[3]

During the years after the 1962 agreement, numerous amendments, extensions, exercise options, and correspondence ensued between MCA and the Holly heirs, Petty, and the Crickets. MCA and its predecessor companies issued semiannual royalty statements and payments for over 40 years without any litigation among the parties.

Each of the contracts entered into by Holly and the Crickets contained substantially similar provisions. Pursuant to those contracts, the statements corresponding to the semiannual royalty payments became binding on the recipients two years after each statement was issued. As specified in the contracts: "The Company will within 45 days after the expiration of each calendar half year, render a statement of accrued royalties under this agreement and all previous agreements earned during such preceding calendar half year . . . . Such statement shall become binding upon the Artist two years after it is rendered unless objection has been made to it during such period of time."

The contracts further provided for payment of royalties based upon a percentage of the records sold, specifying a royalty of from 3 to 10 percent "of the suggested retail list price [SRLP] in the country of manufacture, less governmental taxes, on 90 percent of all records sold." The agreements also all contained the following identical language providing for payment of royalties on the price of the recorded unit valued by the SRLP of a record *without its packaging*: "Royalties on records sold in or as albums, or in jackets, covers, or box or in any manner other than stock factory sleeves shall be determined by the suggested retail list price for replacement of the recorded unit."

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[3] The Crickets assert in the present litigation, in pertinent part, that Petty breached his fiduciary duty to them, and that Coral and Petty acted in concert and colluded to deprive the Crickets of their rightful royalties by entering into the 1962 agreement. The Crickets further assert that the method of accounting thereafter used by MCA hindered discovery of the fact that they were not being paid their rightful royalties, and that MCA owed the Crickets a fiduciary duty as a result of its collusion with Petty.

However, at the time of the recording contracts at issue, no replacement units without jackets, covers, or other containers were sold. The notion of purchasing a replacement record without its jacket, cover, or other container was a phenomenon that occurred in the 1930's and 1940's, but which had no application for the retail consumer purchasing recordings in the 1950's by Buddy Holly and the Crickets.

The contract language specifying use of the SRLP *for replacement units* was archaic language from a bygone era of the music industry. The concept of a replacement unit had its roots in the music industry practices of the 1930's and 1940's, when records were made of shellac and only one song could be recorded on each side of the record. In order to sell multiple songs together, several of the individual shellac records were put in sleeves within photo album-style packaging called an album (hence, the use of the term today to describe records). If one of the shellac records in the album broke, the consumer could purchase a single replacement record without having to purchase an entirely new album. The price for the album with the packaging and records was, of course, greater than the total of the price for the individual records alone. The custom and practice in the record industry was for the record companies to pay royalties based on the lower price of the individual replacement records only, and not on the higher price of the records with the album. The purpose of this industry practice was to pay the artists royalties based only on the recording they had created, not on the packaging the recording company had created.

After 1948 when the long playing vinyl record (the LP) was introduced, each record could then contain many songs on each side. However, record companies continued the practice established with shellac records of paying royalties only on what the artist created (the music) and not on the portion attributed to what the artist did not create (the packaging). Most record companies also continued using the same contract language they had used during the shellac record era and specified that royalties were based on the SRLP for replacement units. Initially, after the introduction of the LP, some record companies continued to have price lists reflecting both the price of the record with its album and the lower price of a replacement unit without the packaging.

Eventually, by the early 1960's all the record companies stopped publishing the SRLP for replacement units. MCA, like most other record companies, unilaterally applied a standard percentage deduction to the SRLP for the entire product. MCA set SRLP figures for the purported replacement of the recorded unit in its sole discretion. MCA set the price for the replacement recorded unit by applying deductions ranging from 10 to 25 percent of the SRLP for the entire product to determine the price of the recorded unit without the packaging. MCA's standard deduction was 10 percent for vinyl records, 20 percent for cassette tapes (in the 1970's), and 25 percent for compact discs.

The payment of royalties by MCA and its predecessor companies.

Based upon the various recording contracts at issue in this case, MCA or its predecessors have paid royalties for over 50 years. They also sent out semiannual royalty statements during that period of time. For example, the typical royalty statement representing domestic sales provided the following information: (1) the record or catalog number; (2) the per unit royalty (without any information as to how it was calculated); (3) the number of units reported sold in the period; and (4) the dollar amount of royalties earned, calculated by multiplying the per unit royalty by the number of units.

In 1970 and 1971, Petty and the Holly heirs began to claim that they were unsatisfied with their royalty payments and sent MCA a number of letters to that effect. Petty and the Holly heirs requested an audit of Coral and Decca. Petty and the Holly heirs were advised that they were welcomed to audit the accounting records, but they never pursued an audit, apparently because of the expense involved. In 1979, Petty, the Holly heirs, and the Crickets sent a letter to MCA requesting an audit, and they even hired an auditor and legal counsel. Their counsel advised them that an accounting firm had reviewed some of MCA's royalty statements and indicated that "potentially substantial royalties are unaccounted for and that an audit could be economically productive." However, the matter was not pursued, apparently because of the cost of auditing MCA's books.

In 1985, Holly's wife again raised concerns about her royalty payments. She hired counsel and sent various letters to MCA setting forth her complaints. She wanted to investigate the royalties because the amount paid to her appeared "so miniscule" in comparison to what the market indicated they should be. However, she did not investigate based on her suspicions because she did not have the money to pursue the matter.

The dispute and the initiation of litigation.

In the late 1980's, the Holly heirs approached MCA about selling to MCA some additional previously unreleased master recordings. During the course of several years, MCA tried to work out an agreement to purchase the masters. At some point, the negotiations also turned to updating the royalty agreements, and the Crickets became involved in the discussions. MCA negotiated with the parties over the course of a long period of time, and offered some terms more favorable to the parties than provided for in the existing contracts.

However, the agreements were never executed. The deal fell apart apparently because the parties could not agree among themselves how to divide up the new royalty payments offered by MCA. According to MCA, the Holly heirs and the Crickets made competing and inconsistent claims against MCA regarding the proper allocation and payment of royalties. The Crickets claimed they were entitled to royalties that MCA had paid to the Holly heirs, and the Holly heirs asserted they were entitled to keep that money. And, the Holly heirs and the Crickets could not agree on how future royalties should be split among them.

Facing competing and inconsistent demands from the Holly heirs and the Crickets, in April of 1999, MCA filed a lawsuit for declaratory relief, seeking a judicial determination of the royalties owed and their proper allocation. Cross-complaints ensued, alleging causes of action for an accounting, a constructive trust, breach of contract, fraud, breach of fiduciary duty, conversion, and unfair business practices. The cross-complaints alleged, in pertinent part, that an accounting was required because "the precise amount of money due from MCA to Cross-Complainants is unknown to Cross-Complainants and cannot be ascertained without an accounting."

Relevant procedural history.

MCA demurred to the claims in the cross-complaints on numerous grounds, including the insufficiency of the Holly heirs' fraud allegations and the time bars under the statute of limitations. The Holly heirs argued both that MCA committed fraud and that the statute of limitations was tolled because the format of the information in MCA's royalty statements constituted a fraudulent concealment of MCA's purportedly improper royalty accounting. The court rejected the argument by the Holly heirs that MCA's royalty statements had fraudulently concealed its accounting practices, and it sustained without leave to amend MCA's demurer to the causes of action for fraud, breach of fiduciary duty, and unfair business practices. Discovery continued based on the remaining claims.

Two years into the litigation, the Holly heirs again attempted to allege a fraud claim. They again asserted that MCA had committed fraud because its royalty statements did not contain what they believed to be sufficient information. The trial court again rejected that theory and reiterated that royalty statements do not reflect "concealment" merely because they are not comprehensive.

In October of 2001, during the course of pretrial discovery, the trial court (Judge James Dunn) ordered the parties to participate in a detailed audit plan to resolve as many of the relevant figures and calculations at issue as possible. For example, MCA was directed to serve on the parties a written explanation of how the royalty base used by MCA to pay royalties on foreign sales had been calculated from 1995 to the present, and the auditor was to conduct an audit of MCA's books and records focusing on the allegations of the failure to pay royalties based upon the SRLP, improper use of packaging deductions, improper half-rating, and diversion of the Crickets' royalties to the Petty and Holly parties. The audit plan directed the parties to hire a music industry auditor, who was to draft a detailed report setting forth an analysis of the additional royalties due, and MCA was to respond with a critique of that analysis.

Delays ensued in finishing the audit in a timely manner. In response to MCA's motion for sanctions because of the delay, the Holly heirs and the Crickets explained the delay by noting that MCA had produced a substantial amount of information in detailed form when it could have been produced in summary form. Further, they explained that "this action involves the analysis and synthesis of dozens of albums, all in differing formats and configurations which affect the distribution or royalties, distributed around the world (i.e., involving different SRLPs)." The auditor stated that the "problem of completing the report is due principally to the sheer volume of information that has to be digested and recapitulated." The trial court observed that the trial of such a complex accounting dispute "would probably be very difficult for a lay jury to follow." The court ultimately awarded MCA limited monetary sanctions. The audit report process took approximately 18 months to complete and resulted in thousands of pages of reports and analysis.

In July of 2002, while the audit was in process, MCA moved for summary judgment, arguing that all the claims were barred by the applicable statutory and/or contractual limitations periods. The rejoinder to that argument was that the discovery rule should apply (see *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805 (*April Enterprises*)), pursuant to which the statute of limitations had not begun to run until discovery of the claims in the mid-1990's. MCA also moved for summary adjudication of the Crickets' breach of fiduciary duty claim, which alleged that MCA conspired with Petty to breach his fiduciary duty to them as their manager. MCA argued that it did not owe a fiduciary to the Crickets and could not be liable under a conspiracy theory. The Crickets urged that was not the applicable law.

The trial court granted summary adjudication in favor of MCA on all claims except the equitable and breach of contract claims, which the trial court limited to royalty statements issued within the relevant limitation periods. Specifically, for the Holly heirs and the Petty estate, their claims were barred for all statements outside of their two-year contractual limitations period. Finding that the same two-year bar in the Crickets' contracts was not reasonable because they were not granted an express audit right, the trial court barred all the Crickets' claims related to statements outside the four-year statute of limitations period.

In granting MCA's motion in part, the trial court held that the discovery rule did not apply to breach of contract claims except in the unique circumstances where the defendant's fraud blocks the plaintiff's discovery of claims, circumstances it deemed not present here. The trial court further held that, alternatively, even if the discovery rule did apply, the facts presented by MCA demonstrated that the complaining parties were on inquiry notice. As to the claimed breach of fiduciary duty, the trial court reasoned that a plaintiff cannot bring a claim for breach of such duty against a defendant unless that defendant has a fiduciary duty to the plaintiff or is an agent or employee of a fiduciary to the plaintiff. Because MCA was not an agent or an employee of Petty, the trial court dismissed that claim.

In March of 2003, while the case was still pending before Judge Dunn, MCA moved to bifurcate the legal and equitable claims for trial, requesting that the cause of action for an equitable accounting be tried to the bench first pursuant to the "equity first" doctrine. The court held that it would apply the "equity first" doctrine and try the accounting claim first. It also observed that "courts do support and encourage the equity case be tried first," and remarked that in any event the breach of contract claims "sound[] [i]n equity" and the "gist of [the] action is equitable." In June of 2003, we summarily denied a writ petition challenging the court's order, and the Supreme Court denied review.

After the trial court granted MCA's bifurcation motion, opposing counsel moved to disqualify Judge Dunn on the ground that he had earlier participated in settlement discussions with the parties and now would be trying the equitable claims. Judge Dunn recused himself in response to the motion, and the case was transferred to Judge George Wu.

In April of 2004, the parties agreed to further bifurcate the bench trial of the equitable accounting claim into two phases. The first phase would address "contract interpretation issues necessary to decide the accounting issues," and the second phase would address "accounting for amounts due, if any, to [the royalty claimants] relating to the contractual interpretation issues resolved in the first phase of the proceedings."

The parties further stipulated that the first phase of the trial focusing on contract interpretation issues would address the following: whether MCA could calculate royalties for CD's based on the CD SRLP or the black vinyl equivalent price; whether MCA could take a packaging deduction when calculating royalties; whether MCA had to pay royalties on free goods to the royalty claimants; whether MCA had paid proper royalties for record club income; and whether MCA had used appropriate royalty base prices in calculating the foreign royalties due.[4]

The parties then presented evidence on the first phase issues. Both sides presented testimony from various music industry experts concerning the practices in the music industry in the late 1950's and thereafter. Additionally, two MCA executives and Maria Holley testified. In June of 2005, the court issued its statement of decision. The trial court rejected all the claims of improper accounting, except for one. Regarding the packaging deductions, the court specifically focused not on contract interpretation, but rather on the legal issue of the implied covenant of good faith and fair dealing. The court determined that MCA was entitled to apply a packaging deduction, but ruled that it could not apply a deduction greater than 10 percent.

At a July 2005 status conference, the parties agreed to meet and confer regarding a plan for proceeding with the second phase of the trial. The parties agreed to exchange further accounting reports to reflect an update to the year and half-long audit procedure the parties had previously gone through, taking into consideration the court's rulings in the first phase of the trial. After the MCA auditor's deposition and the further exchange of information among the parties during the course of another year and a half, the parties completed the second phase of the accounting procedure.

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4 The court noted three other issues that the parties indicated they thought they could have resolved. But if not resolved by the parties, these matters would also be resolved in the first phase of the proceedings: which contracts applied to which sound recording; which persons were entitled to royalties from the 1962 master recordings; and whether MCA could apply reduced rates in certain instances when calculating royalties. Ultimately, these three issues were resolved by the parties by stipulation.

In April of 2007, based upon the rulings of the trial court from the first phase of the trial and three years of audit procedures and accounting analysis, the parties came to an agreement regarding the amount of royalties due. The parties submitted their agreement to the trial court by stipulation, and at the start of the accounting phase of the trial they settled based upon the figures agreed to.

Accordingly, the April 11, 2007, trial court's final judgment reflected the following: (1) MCA owed the Petty estate and the Holly heirs a combined $251,325 in additional royalties (consisting of adjustments of $75,183 for packaging, $14,808 for proportionate reductions, and $108,921 for reduced rating) and $52,413 in prejudgment interest (at the rate of 7 percent per annum), and (2) MCA owed the Crickets $233,758 in additional royalties (consisting of adjustments of $61,627 for packaging, $10,452 for proportionate reductions, and $104,572 for reduced rating) and $57,107 (at the rate of 7 percent per annum) in prejudgment interest.

DISCUSSION

I. The trial court did not abuse its broad discretion in trying the equitable accounting claim first.

The Holly heirs, the Petty estate, and the Crickets contend that the trial court erred in depriving them of a jury trial by ordering the parties to an "equity first" proceeding. They assert that the gist of their claim was legal in nature and not equitable, that they were entitled to a jury trial on their claim for money damages, and that no accounting with a balancing of debits and credits ever occurred. However, we find that an accounting of royalties was the centerpiece of the litigation, and that the court acted well within its discretion in trying the equitable accounting claim first.

The California Constitution guarantees the right to a jury trial in actions at law, but not those in equity. (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 462.) A trial court's decision to deny a jury trial where legal claims are pled, on the ground that the gist of the claims are equitable and not legal, is a legal question entitled to de novo appellate review. (See *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698.) However, the situation here under review involves the question of bifurcation, which is reviewed for abuse of discretion. (*National Electric Supply Co. v. Mount Diablo Unified School Dist.* (1960) 187 Cal.App.2d 418, 422; *Dills v. Delira Corp.* (1956) 145 Cal.App.2d 124, 129.)

Apart from whether the gist of a plaintiff's claim—such as the contract claim here—is deemed equitable or legal based on "'the nature of the rights involved and the facts of the particular case'" (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 299), California law permits and actually prefers that an equitable claim—such as an equitable accounting—be tried first. (*Connell v. Bowes* (1942) 19 Cal.2d 870, 871; *Keans, Etc., Inc. v. Alphonzo E. Bell Corp.* (1954) 126 Cal.App.2d 311, 325.) "'[T]he equitable issues, ordinarily, are tried first, for this may obviate the necessity for a subsequent trial of the legal issues,'" promoting a more efficient, nonjury resolution of the lawsuit. (*Richard v. Degen & Brody, Inc.* (1960) 181 Cal.App.2d 289, 295.)

"It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury . . . and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury." (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671; see also *American Motorists Ins. Co. v. Superior Court* (1998) 68 Cal.App.4th 864, 871.) That is exactly what occurred here. And, as previously noted, the decision to bifurcate an action and to try equitable claims first is reviewed for an abuse of discretion. (*National Electric Supply Co. v. Mount Diablo Unified School Dist.*, *supra*, 187 Cal.App.2d at p. 422.)

In the present case, trying the equitable accounting claim first was not an abuse of discretion. An accounting, "usually" analyzing "debits and credits [and] showing a balance due, if any" (*Peoples Finance etc. Co. v. Bowman* (1943) 58 Cal.App.2d 729, 734), is for the purpose of obtaining an equitable judicial settlement of the accounts of the parties and rendering complete justice. (*Verdier v. Superior Court* (1948) 88 Cal.App.2d 527, 530.) Such an equitable proceeding is necessary where "'the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable.'" (*Civic Western Corp. v. Zila Industries Inc.* (1977) 66 Cal.App.3d 1, 14.) The trial court may even appoint a referee to conduct a formal accounting. (Code Civ. Proc., § 639, subd. (a).)

Here, no referee was appointed, and no formal accounting was ever conducted. However, the trial court ordered the parties to engage in an elaborate audit procedure *prior to trial* so they could fully analyze and respond to the voluminous data MCA presented—a process that took approximately a year and a half. After the first phase of the trial, the parties spent another year revising the analysis based on the trial court's ruling in the first phase, during which time additional calculations were run, further information and documents exchanged, and additional depositions of MCA's accounting experts ensued. Indicative of the involved nature of the accounting issues, the parties divided even the trial of the equitable accounting claim into two stages, one stage to determine the applicable contractual rules for the calculations, and a second stage to apply the legal rules to the complex accounting. Thus, the parties spent approximately three years on a detailed accounting analysis to determine the additional royalties due.

Accordingly, the accounting process to determine appropriate royalties was a centerpiece of the litigation. In view of the protracted accounting procedure instituted by the trial court and followed by the parties, we cannot say that the trial court abused its broad discretion in applying the "equity first" doctrine to try the equitable accounting claim first.

Nor did the trial court improperly deny the right to a jury trial. "'The Seventh Amendment to the United States Constitution, which guarantees a federal right to jury trial in civil cases, is not binding on the states.'" (*De Guere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 506.) Under California law, it is well settled that if trial of the equitable claims renders trial of the legal claims moot, the case is over and no party has been improperly denied a jury trial. (*American Motorists Ins. Co v. Superior Court*, *supra*, 68 Cal.App.4th at p. 871.)

II. ***<u>The trial court properly granted summary adjudication of the royalty claims that were outside the contractual limitations period (two years) or statutory limitations period (four years, per Code Civ. Proc., § 337).</u>***

We review de novo the trial court's grant of summary adjudication on statute of limitations grounds. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418-419.) In accordance with the customary standard of appellate review, all doubts as to whether any material, triable issues of fact exist are resolved in favor of the party opposing summary adjudication. (*Id.* at p. 419.)

As to the breach of contract claims, the trial court found that the royalty payments were akin to installment payments, that the statute of limitations began to run from the due date of each payment, and that the cause of action in effect contained claims for multiple breaches of contract. The court thus granted summary adjudication only as to those separate and distinct breaches occurring outside the applicable limitations periods. (See *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854-1855.) As to the Holly heirs and the Petty estate, the court found that the two-year contractual provision, which provided that the amount in the royalty statement was binding if not disputed within two years of issuance, was a valid and enforceable contract provision. Thus, it deemed the claims arising prior to April 9, 1997, barred. As to the Crickets, the trial court found that the provision shortening the four-year statute of limitations to a two-year contractual limitations period was unreasonable and therefore unenforceable, because the Crickets' contracts did not contain an audit clause. (See *Capeheart v. Heady* (1962) 206 Cal.App.2d 386, 388.) Therefore, only the Crickets were governed by the four-year statute of limitations for breach of contract (Code Civ. Proc., § 337), and their claims arising prior to April 9, 1995, were barred.

<u>The delayed discovery rule is inapplicable to this contract claim.</u>

The Holly heirs, the Petty estate, and the Crickets seek to get around the bar of the contractual and statutory limitations periods by relying on the delayed discovery rule, which they argue applies to their breach of contract claims because the breaches were difficult to detect. They assert that because MCA took unauthorized deductions constituting breaches of the contracts without notifying them either expressly (e.g., through a letter explaining that such deductions were being taken) or implicitly (e.g., by identifying on the royalty statements the packaging or other deductions taken), the only way they could have discovered MCA's breaches would have been to conduct an audit.

The delayed discovery rule "delays accrual [of a cause of action] until the plaintiff has, or should have, inquiry notice of the cause of action. . . . [P]laintiffs are charged with presumptive knowledge of an injury if they have '"'information of circumstances to put [them] *on inquiry*'"' or if they have '"'*the opportunity to obtain knowledge* from sources open to [their] investigation.'"' [Citations.] In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807-808, fn. omitted.)

The delayed discovery rule has long been applied to professional malpractice where there is a fiduciary relationship and to various other tort actions. (See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 186-189; *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 99-101.) But, the delayed discovery rule generally does not apply to breach of contract actions, which ordinarily accrue at the time of breach. (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 520, pp. 664-665, § 529, pp. 678-680.) Only two California cases (both decided by Division Seven of this court), *April Enterprises, Inc. v. KTTV, supra,* 147 Cal.App.3d 805, and *Gryczman v. 4550 Pico Partners, LTD.* (2003) 107 Cal.App.4th 1 (*Gryczman*), have applied the delayed discovery rule to the statute of limitations in a contract action (see Code Civ. Proc., § 337) not involving a claim of fraud.[5]

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5 The elements of fraud are: (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. (*Harazim v. Lynam* (1968) 267 Cal.App.2d 127, 130; see *Seeger v. Odell* (1941) 18 Cal.2d 409, 414.)

In *April Enterprises*, *supra*, 147 Cal.App.3d 805, the situation involved the "clandestine" destruction of certain videotapes in the defendant's exclusive custody and control. (*Id.* at p. 827.) The court dealt with what it described as "unusual facts" calling "for an exception to the general rule" (*id.* at p. 832), and held that "the discovery rule may be applied to breaches which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Ibid.*) *April Enterprises* specifically extended the discovery rule beyond the plaintiff's cause of action for breach of fiduciary duty to encompass the cause of action for breach of contract as well because, as in other cases where the delayed discovery rule is applied: (1) the injury was "difficult for the plaintiff to detect"; (2) the defendant was in "a far superior position to comprehend the act and the injury"; and (3) the defendant "had reason to believe the plaintiff remained ignorant he had been wronged." (*Id.* at p. 831.)

Twenty years after the decision in *April Enterprises*, the same court reiterated its holding and explained that "application of the [delayed] discovery rule was not governed by the presence of deliberate concealment or a heightened level of duty to the plaintiff but by two overarching principles: '[P]laintiffs should not suffer where circumstances prevent them from knowing they have been harmed' and 'defendants should not be allowed to knowingly profit from their injuree's ignorance.'" (*Gryczman, supra*, 107 Cal.App.4th 1, 5-6, fn. omitted.) In *Gryczman*, the plaintiff had a contractual right of first refusal to buy certain property from the defendant. The defendant failed to give contractually required notice to the plaintiff that the right of first refusal had been triggered, and the defendant sold the property to a third party. After the statute of limitations had passed, the plaintiff discovered that the property had been sold and sued for breach of contract. The appellate court found the statute of limitations was not a bar, based on the rationale in *April Enterprises.* In fact, *Gryczman* deemed it "an even stronger case for applying the delayed discovery rule . . . [because] the act which constituted the breach—failure to give notice of the option offer—was the very act which prevented plaintiff from discovering the breach." (*Id.* at p. 5.)

The dispositive factor in *Gryczman*—that the act constituting the breach was also the act that prevented the plaintiff from discovering the breach—is not the situation in the present case. There is no evidence that the royalty statements misrepresented any information on the face of the statements. Although MCA personnel acknowledged that an audit would be necessary to determine the exact nature of any erroneous accounting issues, the same is true for every summary royalty account statement. There is no indication that the semiannual royalty statements were ever intended to be a detailed sales log, or to provide source documentation for the figures used, or to demonstrate with "math proofs" the calculations supporting the royalty payment for each song or album. Rather, the semiannual statements were merely a summary or conclusory overview of sales made and money owed.

Moreover, there is no evidence MCA ever hindered the parties from auditing their accounts. In fact, the parties had every opportunity to audit and chose not to do so. When they finally pursued an inquiry about their royalty statements in the 1990's, MCA responded with the requested information. For example, even the Crickets' own allegations revealed that when they finally inquired about their royalty statements in 1998, MCA met with them for a three-day period, agreed to provide them the contracts that were the basis for the royalty distributions and provided spread sheets of the songs for which the Crickets were being paid.

The present case is also readily distinguishable from *April Enterprises, supra,* 147 Cal.App.3d 805, where the defendant engaged in the "clandestine" destruction of videotapes in its exclusive custody and control. (*Id.* at p. 827.) Here, nothing was secretly destroyed or hidden, and further relevant royalty details were readily available upon request. Accordingly, the present case is not one of those rare situations warranting application of the delayed discovery rule in the absence of fraud, and reliance on *April Enterprises* and *Gryczman* is thus misplaced.

Nor is the present case similar to *Weatherly v. Universal Music Publishing Group* (2004) 125 Cal.App.4th 913 (*Weatherly*), except superficially in that both situations involve music royalty payments and royalty statements. In *Weatherly*, the plaintiff argued that the statute of limitations and contractual limitation periods should be tolled because the royalty statements issued by the defendant "were misleading in indicating that his '50% share was being calculated on 100% of all monies [defendant] received'" when, in fact, the defendant allegedly kept 25 to 40 percent of the amounts due and also refused to provide requested source documentation. (*Id.* at p. 918.) The plaintiff in *Weatherly* alleged in part a claim of fraud and argued, "he was misled by the royalty statements, specifically the entries of '100%' in the (% Rcvd) column." (*Id.* at p. 919.) In *Weatherly*, because there was an affirmative misrepresentation, the court concluded that "the right to conduct an audit is not dispositive of diligence where there is evidence that the plaintiff was 'hindered' from discovering the breach by the defendant's misrepresentations." (*Id.* at p. 920.)

Here, however, the parties claiming additional royalties do not point to any affirmatively misleading language in the royalty statements that could have thwarted their detection of improper royalty payments. Rather, they assert the fraudulent concealment of information not revealed in the statements. We find that the summary royalty statements in this case do not fraudulently mislead merely because, for example, details such as the underlying formulas and calculations used and source documentation are lacking on the face of the statements. And, of course, a mere inconsistency between the proper amount of money due and the amount of money reflected in the royalty statements does not constitute fraudulent concealment, because a miscalculation or other innocent error could account for the inconsistency.

The parties claiming additional royalties were on inquiry notice, thus barring their claims outside the relevant limitation periods.

Even assuming the delayed discovery rule applied to the claims in the present case, the evidence established that the parties claiming additional royalties were on inquiry notice, so that claims outside the relevant limitation periods are barred. Under the discovery rule, the statute begins to run when a plaintiff knew or should have known of the facts giving rise to the claim. (*McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 803.) "[T]he statute of limitations begins to run when the plaintiff suspects or should suspect that [the] injury was caused by wrongdoing, that someone has done something wrong to [the plaintiff]. . . . A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, [the plaintiff] must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.,* (1988) 44 Cal.3d 1103, 1110-1111, fn. omitted; see also *Nogart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398.)

Our independent review of the evidence (see *Buss v. Superior Court* (1997) 16 Cal.4th 35, 60) reveals that the parties complaining about inadequate royalties had suspicions about the issue decades ago. As early as 1970, Petty and the Holly heirs sent MCA several letters raising concerns about their royalty payments and requesting an audit, to which MCA's predecessors readily agreed. But, Petty and the Holly heirs did not at that time pursue an audit. Similarly, in 1979, Petty and the Holly Heirs, *as well as the Crickets*, sent a letter to MCA requesting an audit, and they even hired an auditor and legal counsel.[6] Their counsel advised them in a letter that an accounting firm had reviewed some of MCA's royalty statements and indicated that "potentially substantial royalties are unaccounted for and that an audit could be economically productive." However, the matter was not pursued at that time, apparently because of the cost of auditing MCA's books.

Again in the mid-1980's, Maria Holley raised concerns about her royalty payments. She hired counsel and sent various letters to MCA stating her complaints.

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6 This 1979 letter was before the trial court as an exhibit annexed to MCA's reply brief in support of its motion for summary judgment. On appeal, the Holly heirs complain about use of this document on the grounds that it was unauthenticated and not part of the separate statement. (See *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 641.) However, the letter was before the trial court without objection, thus waiving belated complaints about its use. (See Code Civ. Proc., § 437c, subd. (b)(5).) And, we review summary adjudication de novo and determine if it was properly granted based on "all the papers submitted." (Code Civ. Proc., § 437c, subd. (c).)

She wanted to investigate the royalties because the amount paid to her appeared "so miniscule" in comparison to what the market indicated they should be. Surely, if she thought MCA was not paying her the correct amount of money, she had suspicions about MCA paying her improper royalty revenues. However, Maria Holley did not further investigate and did not pursue her suspicions.

The other Holly heirs, the Petty estate, and the Crickets assert Maria Holley's suspicions in the mid-1980's cannot be imputed to them. However, in reviewing a summary adjudication, we consider not only "all of the evidence set forth in the papers," but also "all inferences reasonably deducible from the evidence." (Code Civ. Proc., § 437c, subd. (c).) If Maria Holley found the royalties comparatively "so miniscule" as to raise her suspicions and thus to put her on inquiry notice, it is reasonable to infer that the royalties to others would likewise seem "so miniscule" and hence suspicious to all other parties now belatedly complaining about inadequate royalties. Also, the other parties overlook the fact that all of them were on inquiry notice of their claims at least as early as 1979, when they *all* raised concerns about their royalties. Additionally, after Maria Holley investigated her suspicions by writing some letters to MCA's accounting department in the mid-1980's, MCA's initial lack of response only heightened her concerns such that she considered doing an audit, but she ultimately did not pursue the matter. Therefore, all the parties now complaining about their royalties had claims that accrued at the time of the alleged breaches, and the statutory and contractual limitations periods began to run against them as early as 1979.

MCA's assertion in its cross-appeal, that *all* of the royalty claims are completely barred by the applicable limitations periods, is without merit. According to MCA, all the claims accrued long ago (in the late 1950's and early 1960's) when the complaining parties received their very first royalty payments with improper deductions or with inadequate payments with royalties omitted for certain recordings, and the ensuing periodic payments did not sequentially trigger new periods for the statute of limitations to run. (See *Brown v. Cosby* (E.D.Pa. 1977) 433 F. Supp. 1331, 1337-1340.)

However, the right to receive royalties is not in dispute; only the amount of royalties is at issue. Parsing the royalties in to different categories, as MCA does in its analysis, does not alter the conclusion that it is fundamentally the *amount* of royalties, not the entitlement to royalties, which is at stake. As the trial court properly found, the situation was akin to an installment contract, with each royalty payment in the nature of an installment contract payment and each payment a severable and separate potential breach of contract. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1344; see *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1387-1396.) Thus, where there is no fixed amount to be paid, but rather a continuing obligation to pay periodically a portion of profits as royalties, each breach when payment is due starts the clock anew for statute of limitations purposes.

Accordingly, the trial court properly granted summary adjudication of the royalty claims that were outside the contractual limitations period (two years) as to the Holly heirs and the Petty estate, and outside the statutory limitations period (four years, per Code Civ. Proc., § 337) as to the Crickets (who had no audit rights under the contract).

III. The trial court properly granted summary adjudication and dismissed the Crickets' breach of fiduciary duty claim.

The Crickets alleged a cause of action for breach of fiduciary duty by the fraudulent diversion of royalties. The Crickets asserted that MCA colluded with the Crickets' manager, Norman Petty, to breach his fiduciary duties toward them when MCA's predecessor (Coral) entered into the 1962 agreement with Petty and the Holly heirs for the release of previously unreleased recordings. The Crickets urged that they never knew until fairly recently that Petty had not turned over certain recordings as part of the original 1957 agreements between Holly and Coral, and that Petty then later used those other recordings as leverage to obtain a new contract in 1962 for the Holly heirs and Petty. At the summary judgment stage, the trial court dismissed this claim on the ground that a nonfiduciary cannot be liable on a conspiracy type of theory for the breach of another's duty.

The Crickets acknowledge that pursuant to *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 588-593, a nonfiduciary cannot be liable for breach of fiduciary duty on a conspiracy theory under a personal gain exception or for any other reason, because the nonfiduciary simply does not owe the duty necessary to form the basis for the requisite element of a breach. (*Id.* at p. 592.) We decline the invitation to reject the sound reasoning of *1-800 Contacts, Inc. v. Steinberg, supra*, 107 Cal.App.4th 568. "A nonfiduciary cannot conspire to breach a duty owed only by a fiduciary." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1597.) Broad contrary statements without legal analysis asserting the liability of a nonfiduciary third party when colluding with a disloyal fiduciary (e.g., *St. James Armenian Church of Los Angeles v. Kurkjian* (1975) 47 Cal.App.3d 547, 552) are unpersuasive.

Equally unavailing is the argument that because the Crickets' cause of action actually used the word "collusion," rather than the word "conspiracy," a different result should somehow ensue. The trial court properly treated the collusion language as, in effect, an argument that MCA conspired with Petty.

Accordingly, the trial court properly dismissed the Crickets' breach of fiduciary duty claim.

IV. The trial court properly denied the Holly heirs' motion for leave to file a second amended cross-complaint to add a fraud claim.

We review the trial court's order denying the motion for leave to amend for abuse of discretion. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) Although amendments are liberally permitted (*ibid*.), leave to amend should not be granted where amendment would be futile. (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1475.)

In the present case, the Holly heirs contend they should have been allowed to amend their cross-complaint a second time to plead a fraud claim. They argue that MCA committed fraud because, in essence, the alleged breaches of contract were not apparent on the face of the royalty statements. They complain that the statements provided "such little information" that a reasonable person could not detect that improper deductions were being taken. We conclude that the trial court properly found that the summary nature of the royalty statements did not convert improper royalty accounting allegations into a claim for fraud.

The Holly heirs do not allege, for example, that MCA made any representations to them on their royalty statements or elsewhere that were false regarding either the deductions MCA applied or the accounting methods MCA used. Thus, there was no affirmative misrepresentation of any deduction taken. Rather, the Holly heirs object because MCA's royalty statements provided summary level information regarding units sold and the amount per unit paid (often referred to in the industry as "penny rates") without any further illuminating detail.

Thus, the present case is unlike the myriad cases relied upon by the Holly heirs where the defendant makes a specific representation in a document, for which there is an obligation to provide complete and accurate information, but where the information given is less than complete and the plaintiff is misled. For example, in *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, the defendant investment bank gave information in an offering memorandum to prospective investors about the financial condition of a company, but failed to inform them how near the company was to insolvency. In *Harkins v. Fielder* (1957) 150 Cal.App.2d 528, the defendant heir submitted papers to a court in a will proceeding regarding inheritance issues, but failed to advise the court that there were other heirs who should receive inheritance monies. Similarly, in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, the plaintiff shareholder of a company acquired by another sued counsel for the acquiring company for fraud when counsel provided disclosure schedules about the terms of the deal that intentionally omitted the less attractive terms for the target company and its shareholders.

In the present case, there is no indication that the royalty statements at issue were ever intended to be anything other than a summary receipt or overview. The Holly heirs argue that MCA's so-called "label copy" constituted their secret internal documents, and that the royalty statements were MCA's sanitized and incomplete disclosure statements.

Deposition testimony from MCA employees indeed supports the conclusion that one would have to inspect the label copy to determine if the actual payment was in conformity with the underlying contract. However, the label copy and the royalty statement are not different versions of the same thing. The label copy is the document showing the calculations underlying the penny rate; the royalty statement applies the penny rate to the units sold to determine the amount of money payable to the artist.

The calculations that form the basis for the penny rate are not explained in the royalty statement. For example, the typical royalty statement representing domestic sales provided the following information: (1) the record or catalog number; (2) the per unit royalty (without any information as to how it was calculated and the deductions taken from which the penny rate was derived); (3) the number of units reported sold in the period; and (4) the dollar amount of royalties earned, calculated by multiplying the per unit royalty by the number of units. In contrast to the above described cases involving fraudulent concealment, here, it is obvious that information in the nature of detailed calculations and deductions has been omitted. It is also undisputed that the Holly heirs had a contractual right to audit their royalty statements and thus to discover and understand the calculations and deductions used.

Therefore, under the particular facts of this case, the trial court properly denied leave to file a second amended complaint to allege fraudulent concealment.

V. <u>The trial court erred in ruling that MCA could apply a packaging deduction in calculating royalties.</u>

From 1956 to 1962, all the royalty agreements contained the following identical language, referred to as the packaging deduction: "Royalties on records sold in or as albums, or in jackets, covers, or box or in any manner other than stock factory sleeves shall be determined by the [SRLP] for replacement of the recorded unit." Even at the time MCA's predecessors drafted these agreements, the packaging deduction was based on an outdated format used for the sale of shellac records. Soon after the agreements, record companies stopped publishing the SRLP for replacement units. As the trial court aptly observed, "MCA's predecessors unilaterally took steps which made their own compliance with the precise terms of the royalty payment provision impossible."

The intent of the parties is undisputed, and the language of the packaging deduction provision is clear and unambiguous. The parties intended that royalties would be based only on the music the artist created and not on the packaging the record company created. However, the parties also intended, and the contracts specified, only one way to implement this intended packaging deduction—to use the SRLP for the replacement record, a method outdated at the time of the contracts and abandoned by the record companies soon after the contracts.

The trial court relied on an "implied covenant of good faith and fair dealing" to conclude that MCA was entitled to apply a 10 percent packaging deduction in calculating the royalties due, apparently just adopting the packaging deduction previously used for vinyl records. We acknowledge that generally every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372.) "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658; see also *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818.)

Nonetheless, implied covenants do not always apply to every aspect of a contract. It is well settled that "'there can be no implied covenant where the subject is completely covered by the contract'" (*Lippman v. Sears, Roebuck & Co.* (1955) 44 Cal.2d 136, 142), and '"as a general matter, implied terms should never be read to vary express terms.'" (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc., supra*, 2 Cal.4th at p. 374.) Here, the agreements expressly provided for only one method of implementing the intended packaging deduction—to use the SRLP for the replacement record. Thus, this provision cannot be judicially rewritten under the guise of an implied covenant of good faith and fair dealing with the trial court assigning a 10 percent packaging deduction, no matter how fair that figure arguably might be.

Civil Code section 1613, about which MCA is conspicuously silent, provides the guidance needed to resolve this problem. It provides, in pertinent part, as follows: "Where a contract provides an exclusive method by which its consideration is to be ascertained, which method appears possible on its face, but in fact is, or becomes, impossible of execution, such provision is void." Although deeming the packaging deduction void frustrates the general intent of the parties to provide for such a deduction, MCA's predecessors frustrated the intent of the parties by making their own compliance with the terms of the royalty payment provision impossible. MCA now should be hard-pressed to complain because its predecessors drafted the contracts, and for decades MCA never sought to renegotiate this provision even after the packaging deduction became impossible to satisfy as written.

The solution to MCA's dilemma was to seek a new or amended contract, not to unilaterally redesign the provision implementing the packaging deduction. When the language of a contract is plain and unambiguous, "it is not a court's prerogative to alter it, to rewrite its clear terms, or to make a new contract for the parties." (*Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 9; see *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1073.)

Moreover, there is no merit to MCA's assertion that because it was entitled to set the SRLP in its sole discretion, it somehow had the discretionary power to substitute a different analytical framework—an arguably arbitrary 10 to 25 percent deduction—instead of using numbers corresponding to the actual SRLP of the replacement units for the recordings in question as the parties had originally intended. MCA's discretionary ability to set the SRLP for the replacement of recorded units simply did not encompass the discretion to abandon the use of the actual SRLP for replacement records and then to substitute for it what MCA unilaterally deemed an equivalent.

MCA also urges that its use of percentage deductions was appropriate because it was done by other companies in the industry, and that it acted in good faith because the percentage deductions used were consistent with those historically used in the industry. For example, expert testimony revealed that the SRLP for the replacement of recorded units used by Decca in the 1940's translated to the equivalent of a 14 to 25 percent packaging deduction. However, the issue is not whether MCA's substitute methodology was in good faith. Rather, the issue is the inability of the parties to satisfy the agreed upon and very specific method of ascertaining consideration, and thus the application of Civil Code section 1613.

Regarding the remedy on appeal, the judgment must be modified by striking from it the finding that MCA is entitled to take a 10 percent packaging deduction in calculating the royalties due. MCA urges that we deny all the royalty claimants' grounds for appeal (or find all of their claims are completely barred by the statute of limitations). MCA has not urged on appeal, or at trial, that it should receive quantum meruit or the fair market value of its packaging services. Nor at trial did MCA establish the *actual packaging costs* (e.g., plastic CD holders, paper inserts with graphics and notes, etc.) for the recordings in question. MCA does not seek now, and there is no basis for granting, a second bite at the apple to present belated evidence at trial.

Instead of presenting evidence of its actual packaging costs for the recordings during the years in question, MCA chose to present evidence of the percentage packaging deduction it and other recording companies had in the past substituted for the required SRLP of replacement units. Industry customs and practices may be relevant to establish good faith in setting a discretionary price. (See *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 484-485; *Balfour, Guthrie & Co. v. Gourmet Farms* (1980) 108 Cal.App.3d 181, 190-191.) However, the point here is not the good faith of an industry's substitute pricing practices, but rather the amount of a royalty reduction based on the real cost of MCA's actual packaging services—a figure that can be reasonably quantified.

In the present case, we have no evidence or factual basis for granting MCA the reasonable value of its packaging deduction. (Compare *Maron v. Howard* (1968) 258 Cal.App.2d 473, 487-488 [in a suit for specific performance, where purchase price of real estate could no longer be determined as contemplated by the parties, the trial court properly ascertained the value of the land based on the evidence before it, fixed its fair market value, and then ordered specific performance of the contract based upon such value]; *Carey v. Cusack* (1966) 245 Cal.App.2d 57, 69 [in an action by real estate brokers specifically asking for quantum meruit, the trial court granted recovery reflecting the value of services rendered where terms of the contract became impossible to fulfill].)

Indeed, MCA's witnesses who did address the actual cost of the packaging for CD's did not provide specific figures for the recordings at issue here. Rather, as the trial court observed, the witnesses revealed generally that "the packaging deduction did not equal nor was it specifically based on the actual cost to the record company of manufacturing the album jacket, cassette cover, or CD 'jewel box.'"[7]

Accordingly, we conclude that MCA is not entitled to take any packaging deduction. Royalties cannot, as required by the contract, "be determined by the suggested retail list price for replacement of the recorded unit" because no such SRLP exists. The packaging deduction provision is thus "void." (Civ. Code, § 1613.) MCA, which initiated this litigation, failed to provide an evidentiary basis for assessing the actual reasonable cost of its packaging services for the recordings at issue during the several recent years in question. Thus, there is no factual or evidentiary basis for granting MCA the reasonable value of its actual packaging costs as a deduction. Since we cannot rewrite the packaging deduction provision and MCA failed to provide figures for the quantum meruit value of its packaging services, we eliminate rather than modify the void packaging deduction.

VI. The complaints about MCA's use of so-called foreign "uplifts" are unavailing.

Regarding sales of records in foreign countries, the operative language of the contracts at issue provided for the payment of royalties in the national currency of the

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[7] Unless the recording company and the artist negotiated a different figure, like the 10 percent MCA negotiated with Maria Holley in 1984 and thereafter with the Crickets, MCA and other companies took a standard 25 percent packaging deduction on CD's. The trial court aptly noted that a 25 percent packaging deduction may have been justified long ago when CD's were first introduced, but it was in questionable good faith over time as the cost of producing CD's decreased dramatically.

country where manufactured based upon the "suggested retail list prices" of the records on a country-by-country basis. In the early 1980's, however, many foreign countries (especially in Europe) prohibited the publication of SRLP's. Consequently, record companies could no longer calculate the amount of royalties based on the SRLP in many countries. Record companies, including MCA, decided to deal with that problem by conducting market studies of the prevailing retail prices in each foreign country and then determining how much higher (in percentage terms) the prevailing retail prices were than the corresponding wholesale prices. Based on that information, MCA without notice to the recording artists applied a percentage increase (an "uplift") to its wholesale price in each country to create the SRLP for royalty purposes.

The trial court observed that the royalty recipients' expert witnesses conceded that the use of uplifts for foreign calculations was "not inappropriate," a situation unlike that with the packaging deduction issue. At trial, the Crickets, the Holly heirs, and the Petty estate attacked the substituted uplift methodology and claimed that MCA's practices resulted in improperly lowered or discounted percentages for several reasons relating to the nature of the surveys MCA conducted and the degree of the markup from the wholesale prices. The trial court found an insufficient evidentiary basis for such complaints.

On appeal, the only relief requested by those seeking greater royalties is that the matter be remanded so that the issue of the amount of the uplifts can be determined by a jury and not the trial judge. As previously discussed, however, the jury trial contention is without merit. Thus, the complaint about MCA's creation and use of foreign uplifts is unavailing.

VII. <u>The trial court did not err in awarding prejudgment interest.</u>

The trial court granted prejudgment interest only on the portion of the award that consisted of an uncontested claim, for which additional royalties had been agreed upon fairly early in the litigation. The trial court granted prejudgment interest on the additional royalties awarded based on MCA's stipulation that it would not use so-called half-rating in calculating royalties. The trial court determined that the amount of additional royalties awarded on this ground had been agreed to by the parties relatively early in the litigation (at the end of the 18-month pretrial accounting phase), and that MCA had not contested the claim that prejudgment interest was appropriate. On appeal, the contention is that the royalty claimants are entitled to prejudgment interest on all the additional royalties they received.

There are several statutory grounds for awarding prejudgment interest. First, every person may recover prejudgment interest if the damages are certain or capable of being made certain by calculation, and the right to recover vests on a particular day. (Civ. Code, § 3287, subd. (a).) For damages to be considered a "certainty" as of a specific date, the defendant must know the precise amount owed or be able to compute that amount from reasonably available information prior to any judgment. (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 907-908.) "Damages are deemed certain . . . where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage." (*Esgro Central, Inc. v. General Ins. Co.* (1971) 20 Cal.App.3d 1054, 1060.) Thus, typical situations warranting prejudgment interest involve, for example, back pay, unpaid rent, liquidated contract damages, insurance proceeds, and the like, where the plaintiff claims a readily specified amount due on a specific day.

On the other hand, damages that are not sufficiently certain include, for example, where an accounting is necessary to determine the damages at trial (and thus the existence of a complicated damage analysis), where the plaintiff's original demand for damages far outstripped the ultimate judgment (and thus the damages were not certain enough for the plaintiff to accurately calculate them when initiating the lawsuit), or where the amount of damages depends upon a judicial determination based on conflicting evidence. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 957-962.)

In the present case, when those seeking additional royalties filed suit they had no idea what amount of money they were seeking, and they admitted in their pleadings that an equitable accounting was necessary to determine the amounts due. Thus, the parties participated in a detailed audit procedure to analyze what amounts were due. At no time prior to judgment could MCA have known or readily ascertained the exact amount payable.

A second basis for the trial court to award prejudgment interest is when damages are awarded based on a contract cause of action, with the court having discretion to award prejudgment interest only from the date of the filing of the complaint or later. (Civ. Code, § 3287, subd. (b).) In view of such discretion, courts have rejected prejudgment interest where there "was a bona fide dispute of a complicated nature." (*Moreno v. Jessup Buena Vista Dairy* (1975) 50 Cal.App.3d 438, 448; see *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 492.) Again, the present case involves royalty accounting issues that were admittedly "complex" and with multiple accounting reports extending over a long period of time.

The third basis upon which prejudgment interest may be awarded is in actions for breach of an obligation not arising from a contract, but which involve oppression, malice, or fraud. (Civ. Code, § 3288.) That situation does not apply here.

Accordingly, there is no basis for finding that the trial court abused its broad discretion in applying prejudgment interest only to the award on the uncontested claim for which additional royalties had been agreed to relatively early in the litigation.

DISPOSITION

The judgment is modified to increase the amount of royalties awarded by eliminating the void packaging deduction, and the matter is remanded to the trial court for calculation of that adjustment. In all other respects, the judgment is affirmed.

Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS.

BOREN, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.